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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 684.

COPPERWELD STEEL COMPANY,
Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO,
Appellee.

BRIEF OF APPELLEE.

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vs.

INDUSTRIAL COMMISSION OF OHIO,
Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Since the statement of the case is set out in appellee's brief, no restatement thereof is deemed necessary herein.

QUESTIONS PRESENTED.

1. Is the question presented a federal question for the Supreme Court of the United States to consider?

2. Did the decision of the Supreme Court of Ohio on the demurrer to appellant's petition and amendment thereto constitute a deprivation of property without due process of law or a denial of the equal protection of the laws?

3. Has the appellant such a financial interest in the state insurance fund of Ohio that it can be heard to complain with respect to the distribution thereof?

SUMMARY OF ARGUMENT.

1. The Supreme Court is without jurisdiction to review this case for the following reasons: (1) there was not drawn in question the validity of a statute of the state of Ohio on the ground of its being repugnant to the Constitution of the United States; (2) a federal question was not drawn into question in the Supreme Court of Ohio; (3) the decision of a federal question was not necessary to the determination of the issues before the Supreme Court of Ohio; (4) the Supreme Court of Ohio rendered judgment without deciding a federal question.

2. The refusal of the Supreme Court of Ohio to grant the relief prayed for in appellant's petition and the amendment thereto, and the construction placed upon Section 871-38 of the General Code of Ohio by said court, does not operate to deprive the appellant of its property without due process of law or deny to it the qual protection of the laws.

3. The payment of the death benefits and compensation for injuries awarded by the appellee will not violate any constitutional rights secured to the appellant by the due process and equal protection clause of the Fourteenth Amendment to the Federal Constitution. The appellant has no financial interest in the state insurance fund and consequently the Ohio Supreme Court's refusal to enjoin distribution of moneys from such fund did not deprive appellant of any property without due process of law.

ARGUMENT.

I.

There Is No Federal Question Presented to the Supreme Court of the United States to Consider.

The record in this case discloses that the sole ground upon which the appellant relies to sustain the appellate jurisdiction of the Supreme Court of the United States is that the Supreme Court of Ohio sustained a demurrer to a petition and amendment thereto filed by it in an original action in said court, in which petition and amendment it is alleged that unless certain orders of the appellee are vacated, prohibited and enjoined, the appellant will be deprived of its property without due process of law and will be denied the equal protection of the laws. (R., 7, 22.)

Appellant, in the petition and amendment to the petition filed by it in the Supreme Court of Ohio, did not bring into question the validity of any statute of Ohio on the ground of its being repugnant to the Constitution of the United States, nor was such issue raised by appellee's demurrer. The sole questions presented to the Supreme Court of Ohio, after giving the petition and its amendment an interpretation most favorable to the appellant, were whether or not appellant had a right of appeal to the Supreme Court of Ohio under the provisions of Section 871-38 of the General Code of Ohio, and whether either prohibition or mandamus would lie against the appellee with respect to the relief sought.

The first of these questions was disposed of by reference to previous decisions of the court on the precise question. In regard thereto, it was stated in the opinion of the court by Williams, J. (R., 15):

> "Counsel for plaintiff request re-examination of our previous construction of that provision. It was early held that an employee could not bring a proceeding under that section for the allowance of compensation in addition to that which had previously been allowed. **Gatton v. Industrial Commission,** 93 Ohio St., 203, 112 N. E., 503. Recently it was decided that an employer has no right to have an order, fixing a premium rate, reviewed under this provision. **United States Wall Paper Co. v. Industrial Commission,** 132 Ohio St., 372, 7 N. E. (2d), 798. Since the decision in the **Gatton case** there have been many other decisions construing this section. It is now the established rule that its provisions do not confer upon this court power to review orders of the Industrial Commission allowing claims for injury or death arising out of or suffered in the course of employment but apply only to matters pertaining to the safety code. Orders reviewable thereunder are such as 'relate to places of employment and to safeguards touching the life, heath, and safety of employees.' **Pittsburgh Coal Co. v. Industrial Commission,** 108 Ohio St., 185, 188, 140 N. E., 684. **United States Wall Paper Co. v. Industrial Commission,** supra. In the two latter reported cases citations to other decisions may be found. Upon re-examination of the question we approve and follow the established rule that orders made by the Industrial Commission under the Workmen's Compensation Law are not reviewable under Section 871-38, General Code."

The meaning attributed by the highest court of a state to a statute of the state must be accepted by the United States Supreme Court, on review, as though it had been specifically expressed in the statute.

Quong, Ham, Wah Co. v. Industrial Accident Commission of California, 255 U. S., 445;
Supreme Lodge, Knights of Pythias, v. Meyer, 265 U. S., 30;
Saltonstall v. Saltonstall, 276 U. S., 260;
Senn v. Tilelayers Protective Union, 301 U. S., 468.

With respect to the other questions presented to it, the Supreme Court of Ohio said (R., 16):

"The plaintiff in its petition has not indicated exactly what kind of a writ is sought. It might be either injunction, prohibition or mandamus. Plaintiff's counsel do not specifically urge that injunction will lie but do ask for a writ 'enjoining the defendant.' Therefore, we give passing consideration to the applicability of the injunctive remedy. This court has power to grant an injunction **pendente lite** as ancillary to a cause of which it has jurisdiction, in order to preserve matters in **statu quo**. However, as to chancery cases in which an injunction is sought as a final remedy, original jurisdiction is vested by statute in the Court of Common Pleas. The Supreme Court has, under the Constitution, no original jurisdiction to afford such relief in chancery.

Counsel for plaintiff do contend that this action is 'in prohibition.' Prohibition is a remedy calculated to keep inferior tribunals from usurping power with which they have not been invested. It must be borne in mind that it is not sought herein to prevent a merit rating of a complying employer as was the case in **State, ex rel. Powhatan Mining Co. v. Industrial Commission**, 125 Ohio St., 272, 181 N. E., 99, 82 A. L. R., 938, but to control the action of the Industrial Commission with respect to the allowance or disallowance of certain claims. The power to hear claims and award death benefits and compensation for injuries has been expressly conferred upon the commission by Section 1465-90, General Code, and prohibition will not lie to curb the exercise of that power or to prevent the enforcement of a valid award after it has been made

upon claims properly before it, as were the claims in the case at bar.

Do facts pleaded state a cause of action in mandamus? Mandamus is frequently employed to keep the Industrial Commisison within legal bounds. The writ's use is limited to compelling the performance of a duty specially enjoined by law whether the failure to perform the duty results from an abuse of discretion, a violation of law, or otherwise."

The Construction Placed Upon Section 871-38 of the General Code of Ohio by the Supreme Court of Ohio to the Effect That Said Section Does Not Grant to the Appellant the Right to Have the Order of the Appellee Reviewed by Said Court, Does Not Deprive Appellant of Property Without Due Process of Law.

Appeals, rehearings, or judicial reviews are not essential to due process of law either in judicial or administrative proceedings.

James v. Appel, 192 U. S., 129;
Reetz v. Michigan, 188 U. S., 505;
Pittsburgh, C., C. and St. L. R. Co. v. Backus, 154 U. S., 421;
Andrews v. Swartz, 156 U. S., 272;
Twining v. New Jersey, 211 U. S., 78.

The power to render a final judgment must be lodged somewhere and in every case a point is reached where litigation must cease. What that point is can be determined by the legislative power of the state, for right of appeal is not essential to due process of law.

Standard Oil Co. v. Missouri, ex rel. Hadley, 224 U. S., 270.

There is no provision in the federal Constitution which forbids a state from granting to a tribunal, whether called

a court, board or commission, the final determination of a legal question. **Reetz v. Michigan**, 188 U. S., 505. No right to litigate the same question twice is guaranteed by the due process clause of the Fourteenth Amendment. The right of review in an appellate court is purely a matter of state concern; a denial of a right of appeal altogether would constitute no violation of the federal Constitution.

Kohl v. Lehlbach, 160 U. S., 293;
Baldwin v. Iowa State Traveling Men's Association, 283 U. S., 522.

Consequently, the Ohio Supreme Court's construction of a statute under which the appellant claimed the right to a review of the order of the appellee in the Supreme Court of Ohio, did not deprive appellant of its property without due process of law.

Moreover, the refusal of a writ of prohibition by the Supreme Court of Ohio was not a denial of due process. Prohibition is a preventive writ, designed to prevent a tribunal from proceeding in a matter which it is not authorized to hear and determine or in which it seeks to usurp or exercise a jurisdiction with which it has not been invested by law. **Marsh v. Goldthorpe**, 123 O. S., 103. The purpose of the writ of prohibition is to keep inferior courts or inferior tribunals, ministerial or otherwise, that possess an incidental judicial or quasi judicial power within the limits of their own jurisdiction. **State, ex rel. Nolan, v. ClenDening**, 93 O. S., 264; **State, ex rel. McCrehen, v. Brown**, 108 O. S., 454. Since the appellee is invested with power to hear claims and award death benefits and compensation for injuries and inasmuch as said death benefits and compensation for injuries had already been

awarded, nothing remained to be done save the ministerial act of paying the same, a writ of prohibition was properly denied by the Supreme Court of Ohio.

Likewise, since the appellant was seeking to **enjoin** the appellee from performing an act, purely ministerial in character, it can scarcely be contended that the Supreme Court of Ohio erred and in doing so deprived the appellant of due process by refusing to issue a writ of mandamus **compelling** the appellee to perform an act.

It is therefore respectfully submitted that a federal question was not presented for decision to the Supreme Court of Ohio and that a decision of a federal question was not necessary to the determination of the cause, and consequently this Honorable Court has no jurisdiction to review the decision of the Supreme Court of Ohio.

II.

The Jurisdiction of the Supreme Court of Ohio is Conferred by Section 2, Article IV of the State Constitution and the Limitations of That Jurisdiction Do Not Empower the Supreme Court of Ohio to Grant the Relief Suggested by the Appellant's Petition and Amendment Thereto; Thus, the Refusal of the Lower Court to Grant Appellant the Relief Prayed For Did Not Deprive it of Property Without Due Process of Law, Nor Did it Deny to it the Equal Protection of the Laws.

Neither the allegations of the appellant's petition in the lower court, nor those of the amendment thereto, reveal the kind of relief that appellant is seeking. After alleging that the four injured workmen and the dependents of the two killed workmen were allowed compensation and death benefits respectively, after a hearing upon the applications for reconsideration filed by the appellant, the plaintiff in the lower court alleged the circumstances of the accident of November 13, 1941, and set forth that the orders of the appellee were "unreasonable and unlawful" for eight reasons which are enumerated. The appellant continues to state that said orders are "contrary to law, constitute a gross abuse of discretion, if any, and of the power and authority, of the defendant and are beyond the jurisdiction of the defendant." Thereupon, the appellant states that "the aforesaid orders of the commission unless vacated, prohibited or enjoined will result in the merit, or individual, rating of the plaintiff's workmen's compensation risk to the prejudice of plaintiff, and in unlawfully charging and collecting from the plaintiff premiums therefor in excess

of those which should and may legally be charged and collected." For this reason, it says that unless the orders of the commission are "vacated, prohibited or enjoined" it will be deprived of "its property without due process of law" and will be denied "the equal protection of the laws." (R., 6, 7.)

The amendment to the petition states additional circumstances of the accident of November 13, 1941, and alleges that "the plaintiff * * * has a direct financial interest, to the extent of $20,008.62, plus the amount of additional premiums based on such claims in future years, in the unreasonable and unlawful allowance of the claims allowed herein and the distribution of the state insurance fund on account thereof." (R., 20, 21, 22.)

The prayer of the petition, which is renewed in the amendment thereto, asks for rather sweeping relief, namely: "(1) That the 'orders of the Industrial Commission be set aside, vacated and reversed; that the * * * claims and each of them be disallowed; (2) that a writ issue prohibiting and enjoining the defendant from continuing such orders or any of them in effect, from making any payments thereunder, from taking into consideration any payments which may have been made thereunder in the merit or individual rating of the plaintiff's workmen's compensation risk, and requiring the defendant to vacate such orders and disallow such claims; and (3) for all such further relief to which the plaintiff may be entitled."

The nebulous nature of the allegations of the petition and the prolixity of the prayer, of course, constrained the Supreme Court of Ohio to examine the Constitution of Ohio (Section 2 of Article IV) to discover whether the petition, the amendment thereto, and the prayer invoked the

jurisdiction conferred upon it by the fundamental law of the state.

This inquiry by the court into its own jurisdiction resulted in the conclusions announced in its two opinions (R., 12, 23) to the effect that plaintiff's petition and the amendment thereto did not invoke its jurisdiction as conferred upon it by the Constitution of Ohio. **This is the full extent and import of the judgment of the Supreme Court of Ohio dismissing appellant's petition and entering final judgment in behalf of the appellee.** The lower court, therefore, did not arrive at the point where it could consider whether any statute of Ohio was violative of the federal Constitution, because it **first** concluded that the facts set forth in appellant's petition did **not** raise any controversy the adjudication of which came within the constitutional limitations of its jurisdiction.

All that the appellant sought to achieve by instituting this action in the Supreme Court of Ohio was a judicial review of the decision of the appellee. The fact that such review was denied it and that the question of whether or not the appellee abused is discretion or usurped its jurisdiction was not considered by the Supreme Court of Ohio, lends no support to the claim made by the appellant that it was deprived of its property without due process of law and denied equal protection of the laws. Certainly, the appellant cannot be heard to say that it has been denied due process merely because in an action improperly instituted by it a court properly denied jurisdiction. Where a remedy exists to obtain relief from arbitrary or oppressive conduct of an administrative tribunal it can scarcely be contended that due process of law has been

denied to a person who fails to avail himself of such remedy, or chooses an improper mode in pursuing the same.

In **Louisville & Nashville Railway Company v. Garrett,** 231 U. S., 298, a Kentucky statute under which the railroad commission of that state was authorized to establish rates was under consideration by this Honorable Court. The statute and the action of the commission taken thereunder was attacked as violative of the rights secured to the railroad company by the federal Constitution. It was insisted that the failure to provide for an appeal to any court from the final order of the commission, or for a judicial review of the reasonableness of the prescribed rates before they became effective, made the statute void, and that, therefore, it operated to deprive the carrier of its property without due process of law and to deny to it the equal protection of the laws, contrary to the Fourteenth Amendment of the federal Constitution.

In answer thereto, Mr. Justice Hughes in delivering the opinion of the court, declared (beginning at page 311):

> "But the statute does not deny to the carrier the right of access to the courts for the purpose of determining any matter which would be the appropriate subject of judicial inquiry. We have not been referred to any decision of the state court holding that the statute should be so construed (Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S., 418, 456, 33 L. Ed., 970, 980, 3 Inters. Com. Rep., 209, 10 Sup. Ct. Rep., 462, 702). If the commission establishes rates that are so unreasonably low as to be confiscatory, an appropriate mode of obtaining relief is by bill in equity to restrain the enforcement of the order. Chicago M. & St. P. R. Co. v. Minnesota, 134 U. S., 418, 459, 460, 33 L. Ed., 970, 982, 983, 3 Inters. Com. Rep., 209, 10 Sup. Ct. Rep., 462, 702; St. Louis & S. F. R. Co. v. Gill, 156 U. S., 649, 659, 666, 39 L. Ed., 567, 570, 573, 15 Sup. Ct. Rep., 484; Ex Parte Young, 209 U. S., 123, 166, 52 L. Ed., 705, 731,

13 L. R. A. (N. S.), 932, 28 Sup. Ct. Rep., 441, 14 Ann. Cas., 764. Presumably, the courts of the state, as well as the federal courts, would be open to the carrier for this purpose (Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S., 265, 278, 53 L. Ed., 176, 184, 29 Sup. Ct. Rep., 50) without express statutory provision to that effect."

An examination of the pronouncement of this Honorable Court in the above case impels us to inquire: Has the appellant referred us to a decision of the state courts of Ohio holding that the Workmen's Compensation Act of that state should be construed so as to deny it access to the courts for the purpose of determining any matter which would be the appropriate subject of judicial inquiry?

Clearly, if the appellee in determining that the injuries involved occurred in the course of and arising out of the workmen's employment, usurped its jurisdiction, and acted arbitrarily, an appropriate mode of obtaining relief was open to him. The fact that the Supreme Court of Ohio held that a particular statute did not provide for a judicial review of the order made by the appellee certainly forms no basis for the argument that appellant is denied access to the courts of that state, nor can it be heard to complain because the Supreme Court of Ohio concluded that its original jurisdiction in prohibition and mandamus cannot properly be invoked to afford the relief sought.

III.

Even Though Appellant Had Instituted the Proper Action in a Court Having Jurisdiction to Afford the Relief Prayed For, Such Court Could Not Have Determined That the Payment of the Awards Made by the Appellee Would Deprive Appellant of Its Property Without Due Process of Law or Deny It the Equal Protection of the Law.

The pertinent sections of the Workmen's Compensation Law of Ohio, as the same were in effect at the time the claims involved herein were filed, provided that the Industrial Commission maintain a state insurance fund (Section 1465-53; App., p. 29); that every person defined as an employee therein (Section 1465-61; App., p. 30) or his dependents, shall be entitled to receive from the state insurance fund compensation or death benefits (Section 1465-68; App., p. 31); that the commission shall have full power and authority to hear and determine all questions within its jurisdiction, and its decisions thereon shall be final, except as provided in Section 1465-90 (Section 1465-90; App., p. 33). This latter section enumerates nine grounds for denial of compensation by the Industrial Commission which entitle the workman, or his dependents, to a rehearing. The section then sets forth that subsequent to the rehearing thus provided for, the commission shall again consider the claim and if the claim is again denied on any of the same nine grounds enumerated, then the workman, or his dependents, are entitled to an appeal to the Common Pleas Court where the right to participate in the state insurance fund may be pursued in accordance with the rules

of civil procedure. The rules of civil procedure of course give access to the appellate procedure provided for in the fabric of the general state law.

A canvass of these and other sections of the Workmen's Compensation Act reveals that an employer who has complied with the provisions of the act has no interest whatever in the distribution of the state insurance fund. His interest lies only in the creation of that fund, and that interest is confined to the amount of premiums he pays in the future. This principle is discussed by the Supreme Court of Ohio in the interlocutory opinion where Williams, J., in speaking for the court, says:

> "The complying employer has no direct financial interest in the distribution of the state insurance fund. His interest lies in basic and merit ratings and the amount he is required to pay in premiums. With respect to the subject matter involved in a proceeding upon a claimant's application for compensation under Section 1465-90, General Code, the complying employer's interest is remote." (R., 16, 17.)

Again, in the final opinion of the Supreme Court of Ohio, Williams, J., speaks for the court as follows:

> "In considering the question of due process and equal protection of the laws it is necessary to have in mind that a complying employer is not a necessary or a proper party to the proceeding under Section 1465-90, General Code, for the allowance of compensation. That statute does not provide for his being brought in. His only direct financial interest is, not in the distribution of the fund or in the fund itself, but in the creation of it, that is, in the amount of premiums he pays in the future. Since he has no interest in the fund or its distribution and is not even a proper party to the proceeding, he is not denied a constitutional right by the allowance of a claim for compensation. He is not aggrieved, if at all, until the commission applies 'that form of rating system which, in its judgment, is best

> calculated to merit or individually rate the risk more equitably, predicated upon the basis of its individual industrial accident experience and to encourage and stimulate accident prevention,' pursuant to Section 1465-54, paragraph 3 (formerly paragraph 4), General Code. When action is taken in merit rating, which determines the amount of premiums an employer is required to pay, then for the first time his financial interest is affected."

It thus becomes apparent that the jurisdiction of the commission in so far as it concerns awards made to injured workmen or their dependents is quite separate and distinct from an employer's interest in the premiums he may be required to pay into the fund at some future date. Appellant's obligation to pay increased premiums into the state insurance fund on account of the merit rating system provided for in Section 1465-54, General Code of Ohio, **does not necessarily flow from the adjudication of the commission that an award be made to an injured workman or his dependents.** It must be remembered that the action sought to be brought in the Supreme Court of Ohio was not one in which the appellant sought to prevent a wrongful application of the merit rating system as was true in **State, ex rel. Powhatan Mining Company, v. Industrial Commission**, 125 O. S., 272, but, to the contrary, it was an effort on the part of the appellant to prematurely forestall any adverse merit rating calculation by interfering with the complete discretion invested in the Industrial Commission to adjudicate the claims of injured workmen or their dependents as clearly provided for in Section 1465-90, General Code of Ohio.

The purpose of the Workmen's Compensation Act is to reimburse for impairment of earning capacity without the uncertainties of litigation and the attendant delays, risks,

and expenses. In other words, it provides a cheap and expeditious remedy which could hardly be afforded by the average workman if he were compelled to engage in protracted and expensive litigation which might be induced by the superior financial resources of his employer. **Industrial Commission v. Drake**, 103 O. S., 628. If in each case the employer could circumvent the favorable consideration by the commission of the employee's claim by questioning the jurisdiction of the commission under Section 1465-90, General Code of Ohio, to make the award, then is it clear beyond cavil that every claim could be made, not a cheap and expeditious adjudication by the Industrial Commission, but a contest between the employee and his employer as to whether or not he should receive compensation. Surely, this is not the purpose of Workmen's Compensation Law and the validation of such a form of procedure would vitiate the claimant's rights under Section 1465-90, General Code, and would deprive him of his day in court by way of hearing, rehearing, and appeal to the Common Pleas Court, Court of Appeals, and Supreme Court. The impropriety of such a conclusion is emphasized by the fact that it is not at all necessary for an employer to attack an employee's right to an award in order to protect his prospective financial interest in the state insurance fund.

Furthermore, even though the appellant had instituted a proper action in a court having jurisdiction to afford the relief prayed for, on the ground that the appellee had arbitrarily and unlawfully exceeded its jurisdiction, it seems evident that such court would be constrained to find that as long as the commission had construed the phrase "in the course of employment" in substantial conformity with

the pronouncements of the Supreme Court of Ohio and the Courts of Appeals thereof, it could not be accused of acting without its jurisdiction.

Section 35 of Article II (App., p. 25) of the Constitution of Ohio provides that "For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed * * *." Pursuant to this constitutional authority, the term "injury" as contemplated by the Workmen's Compensation Act is defined in Section 1465-68, General Code of Ohio, as follows:

> "The term 'injury' as used in this section and in the Workmen's Compensation Act shall include any injury received in the course of, and arising out of, the injured employee's employment."

Pursuant to Section 35 of Article II of the Constitution of Ohio and Section 1465-68, General Code of Ohio, the term "injury" has been construed a number of times by our state courts.

In **Industrial Commission of Ohio v. Barber**, 117 O. S., 373, the syllabus reads as follows:

> "1. An employe, who for the purpose of reaching his place of employment travels a course which affords the only unobstructed access thereto, enters upon the course of his employment within the contemplation of the Workmen's Compensation Law when he reaches the zone of such employment that is under the control of his employer, even though such zone be outside the inclosure of his employer.
>
> 2. The hazards of such zone growing out of the conditions and environments of his employment are hazards of his employment, and an injury received by an employe due to such hazards is compensable out of the industrial insurance fund of the Workmen's Compensation Law."

In **Industrial Commission of Ohio v. Henry**, 124 O. S., 616, the syllabus reads as follows:

"1. Where the claimant's decedent had entered upon his employment in the early morning hours, had left the premises of the employer to get his breakfast at a restaurant, in accordance with a custom acquiesced in by the employer, and, while returning to the premises of the employer by a direct and necessary route along a public thoroughfare, was struck by a train running upon the tracks of a railroad so immediately adjacent to the premises of the employer that the only way of ingress and egress toward the restaurant was one of hazard, the accident arose out of and in the course of the decedent's employment.

2. In such case, upon trial of an appeal from a denial of compensation by the Industrial Commission upon jurisdictional grounds, it is not reversible error for the trial court to charge that the jury should take into consideration the nature of the employment, the hours of service required of the decedent, the nature and condition of the premises where the deceased was employed, and of the premises surrounding the same, the natural and ordinary conduct of persons so employed during such hours while acting in such employment."

The syllabus of **Spellman v. Industrial Commission of Ohio**, 73 O. App., 369, reads as follows:

"Where an automobile, in which two employees were riding, was struck by a cut of freight cars being switched on railroad tracks contiguous to the employer's premises at a time when such employees were about to enter the premises to commence their day's work, the one employee's death and the other's injury, resulting from such accident, arose out of and in the course of their employment within the meaning of the Workmen's Compensation Act, since the tracks were so immediately adjacent to the employer's premises that the only way of ingress and egress to the latter was one of hazard and inasmuch as such tracks were in such proximity to the premises that the former may

> be said, under all the circumstances, to be within the zone of such employees' employment."

An examination of the above pronouncements reveals that the Industrial Commission, in allowing the claims growing out of the injuries involved in the case at bar, did not depart in any substantial manner from the construction of the term "in the course of, and arising out of, the injured employee's employment" as enunciated by the courts of the state.

It is too well-established to require extensive citation that this Honorable Court will not disturb the construction attributed to a state statute by the courts of that state.

In **Des Moines National Bank v. Fairweather**, 263 U. S., 103, the court said:

> "We are asked to go into the proper construction of the state statute and its validity under the state Constitution. But these are questions of local law, the decision of which by the Supreme Court of the state is controlling."

Moreover, the Supreme Court of the United States, in **Cudahy Packing Company v. Parramore**, 263 U. S., 418, in construing the provisions of the Utah Workmen's Compensation Act, which provides for the payment of compensation for personal injury or death of an employee by accident "arising out of or in the course of his employment," found in the first branch of the syllabus as follows:

> "A decision of a state court that the Workmen's Compensation Act of the state applies to injuries occurring to an employee on his way to work before the hour for beginning work has arrived is binding on the Supreme Court of the United States."

Mr. Justice Sutherland, in delivering the opinion of the court in **Cudahy Packing Company v. Parramore**, states:

> "It is settled by the decisions of this court and by an overwhelming array of state decisions, that such statutes are not open to constitutional objection because they abrogate common-law defenses or impose liability without fault. But the contention here, shortly stated, is that the accident was one which occurred off the premises of the employer, on a public road, outside the hours of employment, and while the employee was not engaged in any business of the employer; that it was not the result of any industrial risk, but arose from a common peril to which the public generally was exposed; and that consequently liability is imposed arbitrarily and capriciously. It may be assumed that where an accident is in no manner related to the employment, an attempt to make the employer liable would be so clearly unreasonable and arbitrary as to subject it to the ban of the Constitution; but where the accident has any such relation we should be cautious about declaring a state statute creating liability against the employer invalid upon that ground. The modern development and growth of industry, with the consequent changes in the relations of employer and employee, have been so profound in character and degree as to take away, in large measure, the applicability of the doctrines upon which rest the common-law liability of the master for personal injuries to a servant, leaving, of necessity, a field of debatable ground where a good deal must be conceded in favor of forms of legislation calculated to establish new bases of liability more in harmony with these changed conditions."

Mr. Justice Sutherland then very pointedly states:

> "Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital,

> —the one for the sake of the wages and the other for the sake of the profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured. * * * The fact that the accident happens upon a public road or at a railroad crossing, and that the danger is one to which the general public is likewise exposed, is not conclusive against the existence of such causal relationship, if the danger be one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree."

An analysis of the Parramore decision would seem to indicate that if this Honorable Court had the proper opportunity to review the reasonableness of the decision of the Industrial Commission of Ohio in the claims involved in the case at bar, the doctrine enunciated in **Cudahy Packing Company v. Parramore**, supra, would impel the court to the conclusion that the Industrial Commission of Ohio had acted well within the jurisdiction conferred upon it by the Constitution and statutes of that state.

IV.

Appellant is Not Denied the Equal Protection of the Laws.

While not strenuously pressed by it, the appellant suggests in his brief (pp. 11, 12, 38) that it is denied the equal protection of the laws by reason of the fact that the so-called "self-insuring employers" and "non-complying employers" have a legal right to a judicial determination of the question as to whether or not the injury or death occurred in the course of and arose out of the employment, while the complying employer has no right to a judicial review of the order of the Industrial Commission awarding compensation.

In this connection it must be borne in mind that when an award for compensation is made to an employee of a self-insuring employer or non-complying employer, such employer is required by law to pay the full amount of the award, while a complying employer, in the event an award is made to one of his employees, has no such obligation.

True, any compensation or death benefit paid from the state insurance fund on account of an injury or the death of an employee the latter employer might or might not result in an increase in the rate of such employer's premium. However, if such increase does result from the payment of an award wrongfully made by the Industrial Commission, such employer, as pointed out by Judge Williams in the opinion of the court below "could refuse to pay the premium assessed against him, and upon suit to recover the same, make his defense if any he has."

It is therefore apparent that there is furnished to each type of employer an appropriate method of obtaining re-

lief against an unlawful assessment, whether such assessment be for the full amount of compensation awarded or for the premium claimed to be due the insurance fund.

CONCLUSION.

In conclusion, it is respectfully submitted that a federal question was not drawn into this case before the Supreme Court of Ohio, nor was it necessary for such court in determining all of the issues presented to it by the pleadings, to decide a federal question.

The Ohio Supreme Court's construction of the Ohio statute under which the appellant claims a right to a judicial review of the action taken by the appellee in making the awards involved herein, does not deprive the appellant of his property without due process of law; nor does such court's refusal to prohibit and enjoin distribution from the state insurance fund on the appellant's application therefor by prohibition and mandamus, deny to appellant any rights given him by the "due process" and "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

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